Ordinance, 1960, an offence against section 3(1) and punishable under section 3(2) of the Ordinance. He pleaded guilty and was convicted and sentenced to a fine of $75 and disqualified for holding a driving licence limited to Class III vehicles for a period of twelve months.

In my judgment, the magistrate should not have accepted the plea of guilty in view of the following considerations. The appellant was not represented by counsel. The question of law whether or not there was in force in relation to the user of the motor vehicle such a policy of insurance as complied with the requirements of the Motor Vehicles (Third-Party Risks and Compensation) Ordinance, 1960, was a difficult one for a person unversed in the law to answer. The magistrate could not safely convict solely on an admission of guilt by the appellant. The prosecution should have been called upon to prove beyond reasonable doubt that there was not in force in relation to the user of the motor vehicle at the material time such a policy of insurance as complied with the statutory requirements. I accordingly set aside the conviction and sentence and the order of disqualification and ordered the fine of $75 paid by the appellant to be refunded.

Order accordingly.

LING KAI HUAT & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.) October 17, 1965]

[Sibu — Criminal Appeal No. 5 of 1965]

Penal Code, ss. 383, 384 and 44 — Extortion — Threat to use legal powers as cover for illegal purpose — Whether this constitutes injury within meaning of Penal Code.

Criminal Law — "Injury" — Meaning of.

The appellants appealed against their conviction for extortion. It was alleged that the first appellant, a labourer, and the second appellant, a police constable extorted money from one TSH by threatening to take action against him for trading without a licence. The second appellant's main ground of appeal was that the learned magistrate was wrong in convicting him because the threat alleged to have been made by him was a threat to exercise his legal powers.

Held: when the exercise of legal powers is used as a cover for an illegal purpose then it becomes unlawful and can therefore constitute "injury" within the meaning of the Penal Code. The second appellant was therefore rightly convicted in this case.

Cases referred to:—

(1) *Vincent Lee* v. *R.* [1949] M.L.J. 296.

(2) *Abu Hassan* v. *Public Prosecutor* [1962] M.L.J. 61.

(3) *Public Prosecutor* v. *Johar* [1965] 1 M.L.J. 139.

(4) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.

CRIMINAL APPEAL.

C. T. Wong for the appellants.

Chew Peng Cheng (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: Appellants were jointly charged with two offences of extortion under section 384 of the Penal Code. First appellant was convicted on both charges and sentenced to 30 months' imprisonment on each charge. The sentences were to run concurrently. Second appellant was acquitted on the first charge but was convicted on the second charge and was sentenced to 21 months' imprisonment. First appellant was in addition charged with two offences of personating a police officer under section 170 of the Penal Code. He was acquitted of the third charge but was convicted on the fourth charge. He was sentenced to six months' imprisonment. This sentence was to run consecutively with the other two sentences. Thus he would have to serve 36 months' imprisonment. Both appellants appealed against their convictions and sentences. Inche C. T. Wong appeared for both appellants while the Deputy Public Prosecutor Inche Chew Peng Cheng appeared for the Public Prosecutor.

First appellant, a Chinese, was a labourer and second appellant, a Malay, was a police constable. On 8th March, 1965 at about 10 a.m. they went to Oya Road, Sibu on a motor cycle. First appellant was the driver and second appellant was a passenger. At the 15th mile, Oya Road it was alleged that they extorted money from Tiong Sing Huak by threatening to take action against him for trading without licence. There it was alleged first appellant personated as a police officer. They then proceeded back to Sibu town stopping at the 10th mile, Oya Road where it was alleged that they extorted money from Lih Tai Moi similarly by threatening to take action against him for trading without licence. In the course of this extortion first appellant purported to have personated as a police officer.

First appellant put up a defence of *alibi* while second appellant did not dispute that he was at the 10th and 15th mile, Oya Road on the day and times. However, second appellant denied demanding money from the two persons named.

The learned magistrate had gone into the evidence most carefully. If I may say so he examined the evidence critically and fairly. He had seen and heard all the witnesses and would be in a better position to assess their credibility. I do not have such opportunity and see no reason to interfere with his finding of facts. There is no substance in the first appellant's grounds of appeal against the learned magistrate's finding

of facts. I uphold the conviction. Accordingly first appellant's appeal from conviction is dismissed.

First appellant also appealed against sentence as being manifestly excessive. He complained that the 36 months' sentence of imprisonment was in effect the maximum sentence for the offence of extortion. It is not surprising that the learned magistrate took a serious view in the case of first appellant in the light of his antecedents. Apart from his various previous convictions for offences under the Penal Code he had a previous conviction for personating a public servant. However, his previous convictions do not include any offence of extortion. Taking all the circumstances into consideration I consider that the sentence as a whole is excessive. The sentences in the first two charges will stand. The sentence of 6 months on the fourth charge to run consecutively to the sentences of the first two charges will be varied. I will therefore alter the term of the sentence of 6 months' imprisonment on the fourth charge. This sentence will now run concurrently with the sentences of the first two charges.

The appeal of the second appellant is of some considerable difficulty. Inche Wong contended that the learned magistrate erred in law in convicting the second appellant of the offence of extortion because the threat, if any, which the prosecution alleged to have been made by the second appellant, was a threat to exercise his legal powers vested in the second appellant. He submitted that the essential ingredient of the offence of extortion, that is, by putting a person in fear of injury, was lacking. It was not disputed that second appellant was a police constable and that he was not in uniform at the time.

Inche Chew pointed out that second appellant was attached to the traffic branch and had nothing to do with the inspection of trade licences. Further, on the day and time in question he was off duty.

Inche Wong cited two authorities, namely, *Vincent Lee* v. *Rex* [1] and *Abu Hassan v. Public Prosecutor* [2] in support of his submission that the exercise of legal powers however done can never constitute "injury" as defined in the Penal Code. Section 44 of the Sarawak Penal Code defines "injury" to mean any harm whatever illegally caused to any person, in body, mind, reputation, or property.

I was also referred to *Public Prosecutor* v. *Johar* [3] and *Loh Kwang Seang* v. *Public Prosecutor.*[4] In *Johar's case* a police officer in the Federation of Malaya while in Singapore demanded money from a certain person and uttered threat of arrest to someone. The learned district judge considered that he was bound by the principle laid down in *Vincent Lee's case* and *Abu Hassan's case.*

Wee Chong Jin C.J. of Singapore in his short but lucid judgment pointed out that as respondent was not a police officer in the State of Singapore he had therefore no legal powers to exercise in Singapore and directed that he be called on for the defence. Therefore the question whether the principle laid down in *Vincent Lee's case* and *Abu Hassan's case* was correct or not did not directly arise for consideration. So he did not venture his opinion.

However, he set down the relevant matters clearly at page 140 and I can do no better than to quote them:—

"In *Vincent Lee* v. *Rex*, *supra*, the appellant, a volunteer special constable duly vested with all the powers and privileges of a police officer had threatened various persons who were smoking chandu with arrest. He was charged and convicted of the offence of extortion under section 384 of the Penal Code. Murray-Aynsley C.J. in allowing the appeal had this to say:

> 'The offence of extortion is defined in section 383 of the Penal Code. It will be seen that an essential part of the offence is putting a person in fear of 'injury'. In turn 'injury' is defined in section 44 of the same Code. There 'injury' is harm illegally caused. It appears to me to follow from this that the exercise of legal powers however done can never constitute harm.'

In *Abu Hassan* v. *Public Prosecutor*, *supra*, the appellant was a customs officer who had threatened to report to higher authority someone, who had attempted to pass through a customs shed with money in excess of the amount that could be lawfully exported. It was conceded by the prosecution that the alleged threat was a threat by the appellant to exercise his legal powers. Hepworth J. on appeal held 'that the exercise of legal powers, however done, can never constitute harm' and that therefore the essential element of 'injury' as defined by section 44 of the Penal Code was not present on the facts.

On the other hand, in between these two cases Rigby J. in *Loh Kwang Seang* v. *Public Prosecutor* held on similar facts that it was a case of extortion. He says at page 273:—

> 'If *A*, (a police officer) knowing that *B* has committed an offence in respect of which it is *A's* duty to take action against him, threatens to take such action against him unless *B* pays him a sum of money and, in consideration of such money being paid by *B*, forbears to take such action, then *A* has committed the offences of both corruption and extortion. The offence is 'extortion' because the additional — and I emphasise the word 'additional' — element is present of putting *B* in fear of injury by the threat of bringing a criminal accusation against him.'

There is therefore a conflict of judicial authority as to whether a person, invested with certain legal powers, can commit the offence of extortion under the Penal Code, where all the elements of extortion are present but the 'injury' is caused when exercising his legal powers."

The definition of "injury" in the Sarawak Penal Code appears to be similar to that of Malaya and Singapore. That is to say "injury" means harm illegally caused. The emphasis is on the word "illegally". It implies an illegal

act or omission. The illegality arises not as a result of the exercise of the legal powers but as a result of the unlawful demand. At page 1760 of *Gour's* Indian Penal Code (6th Edn., Vol. 3) the question of demand is discussed:—

"Where the making of demand is legal, there is no injury in law, for injury means the causing of harm *illegally*, and no harm, whatever mental suffering it may cause, can be illegal when it is countenanced by law. But while this is conceded, it is said in Madras even in such a case, that, a legal demand may become illegal and extortionate, if it is excessive and out of proportion to the injury sustained. The accused a village magistrate, had his goat, worth two and half rupees, injured by the complainant, whereupon he demanded a sum of Rs. 10 by way of compensation, failing which he threatened to prosecute her. He was convicted of extortion and on the question about the legality of the conviction being referred to the High Court, Best J., said: 'Though to threaten to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of *more than is due* is illegal, and such a threat made with such an object must be held to be a threat of injury sufficient to constitute the offence of extortion. The fact that the offence with which the complainant was liable to be charged was compoundable can make no difference. The question is, was the complainant induced by such threats to pay the accused more than the latter was entitled to, and the finding is in the affirmative. This is sufficient to justify the conviction'."

In the case under appeal there is no question of the demand being justiciable. Second appellant had no such right. The demand was without doubt illegal. Our Penal Code has its origin in the Indian Penal Code. Therefore Indian authority is bound to be persuasive and should be treated with respect. In my view *Loh Kwang Seang's case* seems to be more in line with Indian authority.

Section 383 of the Sarawak Penal Code is word for word the same as the corresponding section in the Indian Penal Code. It reads as follows:—

"383. Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed, which may be converted into a valuable security, commits 'extortion'."

The definition indicates that the extortioner must first use intimidation to achieve his object and such intimidation must be intentional. The intimidation is the putting of any person in fear of any injury to himself or any other person. The nature of injury is discussed at some length in *Gour's* Indian Penal Code. I refer to a passage at page 1759:—

"A corrupt police officer, intending to extort money from a person, took him into custody and threatened to prosecute him for an imaginary offence, intending and knowing that his relations would come forward to ransom him, which was done. Here the money may be intended to be extorted out of the relation, and yet the injury may not be directed against him. In this respect the English view is coincident, it being held by Lord Russel, C.J. that the word 'menaces' in the English Statute includes not merely threats to any person and property, but also involving, no doubt, a threat to injury, but of injury not confined to the person or property of the person threatened.' And as was added in the same case, the threats may relate to any threat of a danger by an accusation of misconduct, not amounting to a crime. The threat may, again, be of the exposure of truth; it need not be of a falsehood. For the offence has nothing to do with the truth or falsehood of the accusation, but with the intention and its effect upon the mind of the victim. Hence a terror or threat of a criminal charge whether true or false amounts to fear of injury and the act of putting a person in terror of a criminal charge amounts to an offence of extortion."

I agree that the exercise of legal powers, if it is lawful, can never constitute harm. It is therefore necessary to ascertain whether the exercise of such powers is lawful or not. To threaten to use the process of the law is lawful. But to do so for the purpose of demanding money or other illegal purpose is unlawful. Consequently using such threat with such an object is unlawful and can amount to a threat of "injury" within the meaning of section 44 of the Penal Code sufficient to constitute extortion. In other words when the exercise of such powers is used as a cover for an illegal purpose then it becomes unlawful and can therefore constitute "injury". For the above reasons I am inclined to support *Loh Kwang Seang's case.*

In that case at page 273 Rigby J. also gave another illustration:—

"But if *A*, acting outside the scope of his duty as a police officer, represents to *B*, falsely and inaccurately, that acts done by him constitute a criminal offence, and, under the threat of bringing an original accusation against him in respect of those acts — and of the consequences that will ensue as a result of that criminal accusation — dishonestly induce *B* to give him money, then the offence is one of plain extortion and not corruption for the very good reason that, in making the accusation, *A* was at no time acting in the course of his duty. It is extortion because, as the very word implies, the money was extorted from *B* as a direct result of the threat of bringing a criminal accusation and of the consequences that would thereafter ensue. In such cases *B*, as the unwilling victim, is in no sense of the word an accomplice to the offence committed by *A* and his evidence, if accepted and believed, does not require corroboration."

The illustration seems to cover the case under appeal. Second appellant went to the 10th and 15th Mile, Oya Road, Sibu, when he was off duty and for his own purpose. If second appellant committed a criminal offence while he was off duty he should not be allowed to claim protection by reason of the fact that he was a police constable. Assuming that as a police constable he could exercise certain legal powers then it follows from what I said previously that once he demanded for money the exercise of such powers became unlawful.

For the reasons given his appeal from conviction is dismissed.

Second appellant had apparently created a favourable impression on the learned magistrate who considered that second appellant had been led astray by first appellant, a man of proved

criminal tendencies. As a police constable he had imprudently chosen such a companion. He had been in the police force for some fifteen years without any blemish. This is his first conviction. In view of his clean record and this being his only known lapse into crime I consider that the sentence is a little harsh. Also with this conviction he would have lost certain benefits. I would therefore allow his appeal against sentence to the extent that his sentence is reduced to 12 months' imprisonment. In both cases the sentences are to be calculated from the date they both served their sentences.

First appellant's appeal dismissed. Second appellant's appeal against conviction dismissed; sentence reduced.

LAU CHUO KIEW v. HII CHEE SOON

[A.C.J. (Lee Hun Hoe J.) October 18, 1965]

[Sibu — Civil Appeal No. 11 of 1965]

Contract — Hwei — Claim by one member against another.

The appellant and the respondent were both members of a "hwei". The head of the "hwei" was originally one of the defendants but she had been made a bankrupt and disappeared. The learned magistrate found that there was no privity of contract between the appellant and the respondent and he dismissed the appellant's claim against the respondent. The appellant appealed.

Held: in a "hwei" the agreement is between each member and the manager or head and not between the members themselves and therefore the learned magistrate was correct in holding that there was no privity of contract between the appellant and the respondent.

Cases referred to:—

(1) *Lee Pee Eng* v. *Ho Sin Leow* [1958] S.C.R. 18.

(2) *Kong Mee Chon* v. *Tang Hie Hiong* Sibu High Court Civil Appeal No. 7 of 1961.

CIVIL APPEAL.

Parties in person.

Lee Hun Hoe J.: This is an appeal against the decision of the court of small causes, Sibu.

Appellant and respondent were both members of a "hwei" of which one Nguon Siew Moi was the "head". Although I note that from the plaint the "head" was named as one of the defendants it seems that when the case came up for hearing the "head" had disappeared from the scene, presumably after being made a bankrupt appellant was not interested in her.

Reference was made to a case of similar nature heard by another magistrate in the court of small causes, Sibu (No. 14/65) in which appellant succeeded in her claim against a member of a "hwei". I need only say that the trial magistrate was not bound by that case. In a "hwei" the agreement in between each member and the manager or "head" and not between the members themselves: *Lee Pee Eng* v. *Ho Sin Leow.*[1] This was adopted by Lascelles J. in *Kong Mee Chon* v. *Tang Hie Hiong.*[2] The view is that in a "hwei" there is only one person who has anything to do with the running of it and he is the manager or "head". He is the person responsible for initiating the "hwei", collecting the subscriptions, receiving tenders and paying out to successful tenderer. He is in the supreme position of trust and in many instances he is held responsible if a member defaults.

Appellant contended that she had a document purported to be a promissory note which she stated she obtained from the "head". This document had on it a stamp of ten cents only. If it were her contention that the document is a promissory note then it should not have been admitted by reason of section 8 of the Stamp Ordinance for article 39 of the First Schedule of the said Ordinance a promissory note attracts a stamp duty of ten cents for every $100 or part thereof. In any event the document was admitted in the lower court and the trial magistrate decided the case on its merits. In effect he found that there was no privity of contract between the appellant and respondent and dismissed the claim. I have no reason to interfere with his finding. The appeal is dismissed with costs.

Appeal dismissed.

LEE KING HUNG v. LOH HUA YONG

[A.C.J. (Lee Hun Hoe J.) October 19, 1965]

[Sibu — Civil Appeal No. 8 of 1965]

Stamp Ordinance (Cap. 32) ss. 8 and 9 — Document improperly stamped — No objection taken at trial — Whether document promissory note or mere agreement.

This was an appeal against the decision of the magistrate and one of the grounds of appeal was that the learned magistrate erred in law in admitting a promissory note in evidence as the document was not properly stamped in accordance with the Stamp Ordinance. No objection was taken to the admission of the document at the trial.

Held: (1) if the document was improperly stamped, the appellate court must hold that it was wrongly admitted, despite the fact that no objection to its admission was raised at the trial;

(2) in this case the document was not a promissory note but merely an agreement or memorandum and it was therefore properly stamped.

Case referred to:—

(1) *Routledge* v. *McKay & Ors.* [1954] 1 All E.R. 855, 856.

CIVIL APPEAL.

George Seah Kim Seng for the appellant.

C. T. Wong for the respondent.

Lee Hun Hoe J.: Originally appellant appealed against the decision of the learned magistrate sitting in the district court, Sibu on four grounds but subsequently he abandoned one.